The Right to Health

THOMAS S. SZASZ, M.D.

THE CONCEPT that medical treatment is a right rather than a privilege has gained increasing acceptance during the past decade.[1] Its advocates are no doubt motivated by good intentions; they wish to correct certain inequalities existent in the distribution of health services in American society.

The desire to improve the lot of less fortunate people is laudable. Indeed, I share this desire. Still, unless all inequalities are considered inequities – a view clearly incompatible with social organization and human life as we now know it – two important questions remain. First, which inequalities should be considered inequities? Second, what are the most appropriate means for minimizing or abolishing the inequalities we deem "unjust"? Appeals to good intentions are of no help in answering these questions.

There are two groups of people whose conditions with respect to medical care the advocates of a right to treatment regard as especially unfair or unjust, and whose situations they seek to ameliorate. One is the poor, who need ordinary medical care; the other group is composed of the inmates of public mental hospitals, presumably in need of psychiatric care. The

[1] "Concisely stated, the standard [of law as public policy] is that every individual has a right to treatment, a right to good treatment, a right to the best treatment." B. S. Brown, "Psychiatric Practice and Public Policy," *American Journal of Psychiatry*, August, 1968, pp. 142-43.

Dr. Szasz, whose M.D. is from the University of Cincinnati in 1944, is Professor of Psychiatry, State University of New York, Upstate Medical Center, Syracuse, N. Y.

This article, slightly condensed here, is reprinted by permission from *The Georgetown Law Journal* of March, 1969.

proposition, however, that poor people ought to have access to more, better, or less expensive medical care than they now do and that people in public mental hospitals ought to receive better psychiatric care than they now do, pose two quite different problems. I shall, therefore, deal with each separately.

Not by Force Alone

The availability of medical services for a particular person, or group of persons, in a particular society depends principally upon the supply of the services desired and the prospective user's power to command these services. No government or organization — whether it be the United States Government, the American Medical Association, or the Communist Party of the Soviet Union — can provide medical care, except to the degree it has the power to control the education of physicians, their right to practice medicine, and the manner in which they dispose of their time and energies. In other words, only individuals can provide medical treatment for the sick; institutions, such as the Church and the State, can promote, permit, or prohibit certain therapeutic activities, but cannot by themselves provide medical services.

Social groups wielding power are notoriously prone, of course, to prohibit the free exercise of certain human skills and the availability of certain drugs and devices. For example, during the declining Middle Ages and the early Renaissance, the Church repeatedly prohibited Jewish physicians from practicing medicine and non-Jewish patients from seeking the former's services. The same prohibition was imposed by the Government of Nazi Germany. In the modern democracies of the free West, the State continues to exercise its prerogative to prohibit individuals from engaging in certain kinds of therapeutic activities. This restrictive function of the State with respect to medical practice has been, and continues to be, especially significant in the United States.

Without delving further into the intricacies of this large and complex subject, it should suffice to note that our present system of medical training and practice is far removed from that of laissez-faire capitalism for which many, especially its opponents, mistake it. In actuality, the American Medical Association is not only an immensely powerful lobby of medical-vested interests — a force that liberal social reformers generally oppose — but it is also a state-protected monopoly, in effect, a covert arm of the government —

a force that the same reformers ardently support.[2] The result of this alliance between organized medicine and the American Government has been the creation of a system of education and licensure with strict controls over the production and distribution of health care, which leads to an artificially-created chronic shortage of medical personnel. This result has been achieved by limiting the number of students to be trained in medicine through the regulation of medical education and by limiting the number of practitioners through the regulation of medical licensure.

Supply and Demand

A basic economic concept is that when the supply of a given service is smaller than the demand for it, we have a seller's market. This is obviously beneficial for the sellers – in this case, the medical profession. Conversely, when the supply is greater than the demand, we have a buyer's market. This is beneficial for the buyers – in this case, the potential patients. One way – and according to the supporters of a free market economy, the best way – to help buyers get more of what they want at the lowest possible price is to increase the supply of the needed product or service. This would suggest that instead of government grants for special Neighborhood Health Centers and Community Mental Health Centers, the medical needs of the less affluent members of American society could be better served simply by repealing laws governing medical licensure. As logical as this may seem, in medical and liberal circles this suggestion is regarded as hairbrained, or worse.[3]

Since medical care in the United States is in short supply, its availability to the poor may be improved by redistributing the existing supply, by increasing the supply, or by both. Many individuals and groups clamoring for an improvement in our medical care

[2] Joseph S. Clark, Jr., the then Mayor of Philadelphia, defined a "liberal" as "one who believes in utilizing the full force of government for the advancement of social, political, and economic justice at the municipal, state, national, and international levels." Clark, "Can the Liberals Rally?" *The Atlantic Monthly*, July, 1953, p. 27.

[3] For an excellent discussion of the deleterious effects on the public of professional licensure requirements, see Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962). Friedman correctly notes that the justification for enacting special licensure provisions, especially for regulating medical practice, "is always said to be the necessity of protecting the public interest. However, the pressure on the legislature to license an occupation rarely comes from the members of the public. . . . On the contrary, the pressure invariably comes from members of the occupation itself." p. 140.

system fail to scrutinize this artificially created shortage of medical personnel and to look to a free market economy for restoration of the balance between demand and supply. Instead, they seek to remedy the imbalance by redistributing the existing supply — in effect, by robbing Peter to pay Paul. This proposal is in the tradition of other modern liberal social reforms, such as the redistribution of wealth by progressive taxation and a system of compulsory social security. No doubt, a political and economic system more socialistic in character than the one we now have could promote an equalization in the quality of the health care received by rich and poor. Whether this would result in the quality of the medical care of the poor approximating that of the rich, or vice versa, would remain to be seen. Experience suggests the latter. For over a century, we have had our version of state-supported psychiatric care for all who need it: the state mental hospitals system. The results of this effort are available for all to see.

The "Right" to Psychiatric Treatment[4]

Most people in public mental hospitals do not receive what one would ordinarily consider treatment. With this as his starting point, Birnbaum has advocated "the recognition and enforcement of the legal right of a mentally ill inmate of a public mental institution to adequate medical treatment for his mental illness."[5]

Although it defined neither "mental illness" nor "adequate medical treatment," this proposal was received with enthusiasm in both legal and medical circles.[6] Why? Because it supported the myth that mental illness is a medical problem that can be solved by medical means.

The idea of a "right" to mental treatment is both naive and dangerous. It is naive because it considers the problem of the publicly hospitalized mental patient as a medical one, ignoring its educational, economic, moral, religious, and social aspects. It is dangerous because its proposed remedy creates another problem — compul-

---

[4] This part of the article is adapted, with minor modifications and additions, from my book, *Law, Liberty and Psychiatry* (New York: Macmillan, 1963), pp. 214-16. My objections to the concept of a "right to mental treatment," formulated in 1962, seem to me as valid today as they were then.

[5] M. Birnbaum, "The Right to Treatment," *American Bar Association Journal* 46:499 (1960).

[6] For example, see T. Gregory, "A New Right" (Editorial), *American Bar Association Journal* 46:516 (1960); and D. Janson, "Future Doctors Chide the A.M.A., Deplore Stand That Health Care Is Not a Right," *The New York Times*, December 15, 1967, p. 21.

sory mental treatment – for in a context of involuntary confinement the treatment, too, shall have to be compulsory.

Hailing the right to treatment as "A New Right," the editor of *The American Bar Association Journal* compared psychiatric treatment for patients in public mental hospitals with monetary compensation for the unemployed.[7] In both cases, we are told, the principle is to help "the victims of unfortunate circumstances."[8]

But things are not so simple. We know what is unemployment, but we are not so clear regarding the definition of mental illness. Moreover, a person without a job does not usually object to receiving money; and if he does, no one compels him to take it. The situation for the so-called mental patient is quite different. Usually he does not want psychiatric treatment. Yet, the more he objects to it, the more firmly society insists that he must have it.

Of course, if we *define* psychiatric treatment as "help" for the "victims of unfortunate circumstances," how can anyone object to it? But the real question is twofold: What is meant by psychiatric help and what should the helpers do if a victim refuses to be helped?

From a legal and sociologic point of view, the only way to define mental illness is to enumerate the types of behavior psychiatrists consider to be indicative of such illness. Similarly, we may define psychiatric treatment by listing the procedures which psychiatrists regard as instances of such therapy. A brief illustration should suffice.

Levine lists 40 methods of psychotherapy.[9] Among these, he includes: physical treatment, medicinal treatment, reassurance, authoritative firmness, hospitalization, ignoring of certain symptoms and attitudes, satisfaction of neurotic needs, and bibliotherapy. In addition, there are physical methods of psychiatric therapy, such as the prescription of sedatives and tranquilizers, the induction of convulsions by drugs or electricity, and brain surgery.[10] Obviously,

---

[7] Gregory, *op. cit.*, p. 516.

[8] *Ibid.*

[9] M. Levine, *Psychotherapy in Medical Practice* (New York: Macmillan, 1942), pp. 17-18.

[10] The following is a curious, though by no means rare, example of the kind of thing that passes nowadays for mental treatment. In Sydney, Australia, "a former tax inspector on trial for murdering his sleeping family was found not guilty on the grounds of mental illness. . . . A psychiatrist told the court yesterday that Sharp, on trial for killing his wife and two children, had apparently cured his mental illness when he shot himself in the head." *New York Herald-Tribune* (Paris), July 5, 1968, p. 5. Murder is here considered an "illness," and a brain injury a "treatment" and indeed

the term "psychiatric treatment" covers everything that may be done to a person under medical auspices – and more.

In relation to psychiatric treatment, then, the most fundamental and vexing problem becomes: How can a "treatment" which is compulsory also be a right? As I have shown elsewhere,[11] the problem posed by the neglect and mistreatment of the publicly hospitalized mentally ill is not derived from any insufficiency in the treatment they receive, but rather from the basic conceptual fallacy inherent in the notion of mental illness and from the moral evil inherent in the practice of involuntary mental hospitalization. Preserving the concept of mental illness and the social practices it has justified and papering over its glaring cognitive and ethical defects by means of a superimposed "right to mental treatment," only aggravates an already tragically inhuman situation.

As my foregoing remarks indicate, I see two fundamental defects in the concept of a right to treatment. The first is scientific and medical, stemming from unclarified issues concerning what constitutes an illness or treatment and who qualifies as a patient or physician. The other is political and moral, stemming from unclarified issues concerning the differences between rights and claims.

Unclarified Issues

In the present state of medical practice and popular opinion, definitions of the terms "illness," "treatment," "physician," and "patient" are so imprecise that a concept of a right to treatment can only serve to further muddy an already very confused situation. One example will illustrate what I mean.

One can "treat," in the medical sense of this term, only a disease, or, more precisely, only a person, now called a "patient," suffering from a disease. But what is a disease? Certainly, cancer, stroke, and heart disease are. But is obesity a disease? How about smoking cigarettes? Using heroin or marijuana? Malingering to avoid the draft or collect insurance compensation? Homosexuality? Kleptomania? Grief? Each one of these conditions has been declared a disease by medical and psychiatric authorities with im-

---

a "cure" for it. In the Brave New World where treatment is a right, will every murderer have the right to a brain injury – if not by means of a gun, then perhaps by that of a leucotome?

[11] See T. S. Szasz, *The Myth of Mental Illness* (New York: Hoeber-Harper, 1961); *Law, Liberty and Psychiatry* (New York: Macmillan, 1963); and *Psychiatric Justice* (New York: Macmillan, 1965).

peccable institutional credentials. Furthermore, innumerable other conditions, varying from bachelorhood and divorce to political and religious prejudices, have been so termed.

Similarly, what is treatment? Certainly, the surgical removal of a cancerous breast is. But is an organ transplant treatment? If it is, and if such treatment is a right, how can those charged with guaranteeing people the protection of their right to treatment discharge their duties without having access to the requisite number of transplantable organs? On a simpler level, if ordinary obesity, due to eating too much, is a disease, how can a doctor treat it when its treatment depends on the patient eating less? What does it mean, then, that a patient has a right to be treated for obesity? I have already alluded to the facility with which this kind of right becomes equated with a societal and medical obligation to deprive the patient of his freedom -- to eat, to drink, to take drugs, and so forth.

Who is a patient? Is he one who has a demonstrable bodily illness or injury, such as cancer or a fracture? A person who complains of bodily symptoms, but has no demonstrable illness, like the so-called "hypochondriac"? The person who feels perfectly well but is said to be ill by others, for example, the paranoid schizophrenic? Or is he a person, such as Senator Barry Goldwater, who professes political views differing from those of the psychiatrist who brands him insane?

Finally, who is a physician? Is he a person licensed to practice medicine? One certified to have completed a specified educational curriculum? One possessing certain medical skills as demonstrated by public performance? Or one claiming to possess such skills?

It seems to me that improvement in the health care of poor people and those now said to be mentally ill depends less on declarations about their rights to treatment and more on certain reforms in the language and conduct of those professing a desire to help them. In particular, such reforms must entail refinements in the use of medical concepts, such as illness and treatment, and a recognition of the basic differences between medical intervention as a service, which the individual is free to seek or reject, and medical intervention as a method of social control, which is imposed on him by force or fraud.

"Rights" versus "Claims"

The second difficulty which the concept of a right to treatment poses is of a political and moral

nature. It stems from confusing "rights" with "claims," and protection from injuries with provision for goods or services.

For a definition of right, I can do no better than to quote John Stuart Mill: "I have treated the idea of a right as *residing in the injured person and violated by the injury*. . . . When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by force of law, or by that of education and opinion. . . . To have a right, then, is, I conceive, to have something which *society ought to defend me in the possession of.*"[12]

This helps us distinguish rights from claims. Rights, Mill says, are "possessions"; they are things people have by nature, like liberty; acquire by dint of hard work, like property; create by inventiveness, like a new machine; or inherit, like money. Characteristically, possessions are what a person *has,* and of which others, including the State, can therefore deprive him. Mill's point is the classic libertarian one: The State should protect the individual in his rights. This is what the Declaration of Independence means when it refers to the inalienable rights to life, liberty, and the pursuit of happiness. It is important to note that, in political theory, no less than in everyday practice, this requires that the State be strong and resolute enough to protect the rights of the individual from infringement by others and that it be decentralized and restrained enough, typically through federalism and a constitution, to insure that it will not itself violate the rights of its people.

In the sense specified above, then, there can be no such thing as a right to treatment. Conceiving of a person's body as his possession – like his automobile or watch (though, no doubt, more valuable) – it is just as nonsensical to speak of his right to have his body repaired as it would be to speak of his right to have his automobile or watch repaired.

It is thus evident that in its current usage and especially in the phrase "right to treatment" the term "right" actually means claim. More specifically, "right" here means the recognition of the claims of one party, considered to be *in the right,* and the repudiation of the claims of another, opposing party, considered to be *in the wrong,* the "rightful" party having allied itself with the interests of the community and having enlisted the coercive pow-

[12] J. S. Mill, "Utilitarianism" [1863], in M. Learner, ed., *Essential Works of John Stuart Mill* (New York: Bantam Books, 1961). p. 238.

ers of the State on his behalf. Let us analyze this situation in the case of medical treatment for an ordinary bodily disease. The patient, having lost some of his health, tries to regain it by means of medical attention and drugs. The medical attention he needs is, however, the property of his physician, and the drug he needs is the property of the manufacturer who produced it. The patient's right to treatment thus conflicts with the physician's right to liberty, that is, to sell his services freely, and the pharmaceutical manufacturer's rights to his own property, that is to sell his products as he chooses. The advocates of a right to treatment for the patient are less than candid regarding their proposals for reconciling this proposed right with the right of the physician to liberty and that of the pharmaceutical manufacturer to property.[13]

Nor is it clear how the right to treatment concept can be reconciled with the traditional Western concept of the patient's right to choose his physician. If the patient has a right to choose the doctor by whom he wishes to be treated, and if he *also* has a right to treatment, then, in effect, the doctor is the patient's slave. Obviously, the patient's right to choose his physician cannot be wrenched from its context and survive; its

---

[13] The proposition that sick people have a special claim to the protection of the State — in other words, that they be allowed to use the coercive apparatus of State to expropriate the fruits of the labor of others — is a part of a much larger theme, namely, the inevitable tendency in a society for each special interest group to enlist the powers of the State on its own behalf. In this connection, R. A. Childs has recently written: "Economically, the state uses its monopoly on expropriation of wealth to create political castes, or 'classes.' . . . Thus, today, we see the state being supported by businessmen who are being benefited by defense contracts and other state patronage, tariffs, subsidies, and special tax 'loopholes'; unions which are benefited by labor laws; farmers benefited by price supports, and other groups benefited by other state-granted privileges. . . . Of course, almost every group is harmed more by the benefits heaped on other groups than it is helped by its own special privileges, but since the state has gotten people to believe that the only valid approach to problems is to increase, rather than to decrease, state powers, no one mentions the possibility of benefiting each group by removing the special privileges of all other groups. Instead, each group supports the state, to benefit itself at the expense of all other groups." R. A. Childs, Jr., "Autarchy and the Statist Abyss," *Rampart Journal*, Summer, 1968, pp. 4-5.

Long ago, Tocqueville had perceived this phenomenon and warned of its dangerous consequences for individual liberty. "The government having stepped into the place of Divine Providence in France it was but natural that everyone, when in difficulties, invoked its aid." Alexis de Tocqueville, *The Old Regime and the French Revolution* [1856] (Garden City, N. Y.: Doubleday-Anchor, 1955), p. 70.

corollary is the physician's right to accept or reject a patient, except for rare cases of emergency treatment. No one, of course, envisions the absurdity of physicians being at the personal beck and call of individual patients, becoming literally their medical slaves, as some had been in ancient Greece and Rome.

Bureaucratic Decisions and Care

The concept of a right to treatment has a different, much less absurd but far more ominous, implication. For just as the corollary of the individual's freedom to choose his physician is the physician's freedom to refuse to treat any particular patient, so the corollary of the individual's right to treatment is the denial of the physician's right to reject, as a patient, anyone officially so designated. This transformation removes, in one fell swoop, the individual's right to define himself as sick and to seek medical care as he sees fit, and the physician's right to define whom he considers sick and wishes to treat; it places these decisions instead in the hands of the State's medical bureaucracy.

As a result, bureaucratic care, as contrasted with its entrepreneurial counterpart, ceases to be a system of healing the sick and instead becomes a system of controlling the deviant. Although this outcome seems to be inevitable in the case of psychiatry (in view of the fact that ascription of the label "mental illness" so often functions as a quasi-medical rhetoric concealing social conflicts), it need not be inevitable for nonpsychiatric medical services. However, in every situation where medical care is provided bureaucratically, as in communist societies, the physician's role as agent of the sick patient is necessarily alloyed with, and often seriously compromised by, his role as agent of the State. Thus, the doctor becomes a kind of medical policeman – at times helping the individual, and at times harming him.

Returning to Mill's definition of a "right," one could say, further, that just as a man has a right to life and liberty, so, too, has he a right to health and, hence, a claim on the State to protect his health. It is important to note here that the right to health differs from the right to treatment in the same way as the right to property differs from the right to theft. Recognition of a right to health would obligate the State to prevent individuals from depriving each other of their health, just as recognition of the two other rights now prevents each individual from depriving every other individual of liberty and property. It would also

obligate the State to respect the health of the individual and to deprive him of that asset only in accordance with due process of law, just as it now respects the individual's liberty and property and deprives him of them only in accordance with due process of law.

As matters now stand, the State not only fails to protect the individual's health, but actually hinders him in his efforts to safeguard his own health, as in the case of its permitting industries to befoul the waters we drink and the air we breathe. The State similarly prohibits individuals from obtaining medical care from certain, officially "unqualified," experts and from buying and ingesting certain, officially "dangerous," drugs. Sometimes, the State even deliberately deprives the individual of treatment under the very guise of providing treatment.

Conclusion

The State can protect and promote the interests of its sick, or potentially sick, citizens in one of two ways only: either by coercing physicians, and other medical and paramedical personnel, to serve patients – as State-owned slaves in the last analysis, or by creating economic, moral, and political circumstances favorable to a plentiful supply of competent physicians and effective drugs.

The former solution corresponds to and reflects efforts to solve human problems by recourse to the all-powerful State. The rights promised by such a State – exemplified by the right to treatment – are not opportunities for uncoerced choices by individuals, but rather are powers vested in the State for the subjection of the interests of one group to those of another.

The latter solution corresponds to and reflects efforts to solve human problems by recourse to individual initiative and voluntary association without interference by the State. The rights exacted from such a State – exemplified by the right to life, liberty, and health -- are limitations on its own powers and sphere of action and provide the conditions necessary for, but of course do not insure the proper exercise of, free and responsible individual choices.

In these two solutions we recognize the fundamental polarities of the great ideological conflict of our age, perhaps of all ages and of the human condition itself; namely, individualism and capitalism on the one side, collectivism and communism on the other.

There is no other choice. ◈